BANKRUPTCY ADMINISTRATION IMPROVEMENT ACT OF 2017

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW

OF THE

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WEDNESDAY, SEPTEMBER 26, 2018

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON REGULATORY REFORM

COMMERCIAL AND ANTITRUST LAW

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 10:00 a.m., in Room 2237, Rayburn House Office Building, Hon. Tom Marino [Chairman of the Subcommittee] presiding.

Present: Representatives Marino, Goodlatte, Buck, Handel, Cicilline, Johnson, Schneider, and Demings.

Staff Present: Daniel Flores, Counsel; Andrea Woodard, Clerk; Susan Jensen, Minority Counsel; and Slade Bond, Minority Counsel.

Mr. MARINO. Good morning. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law will now come to order. Without objection, the Chair is authorized to declare recesses of the Committee at any time. We don't expect to be interrupted by votes at this point.

We welcome everyone here to today's hearing on H.R. 3553, the "Bankruptcy Administration Improvement Act of 2017". I now recognize myself for an opening statement.

Bankruptcy trustees are the backbone of the United States bankruptcy system. Chapter 7 cases are bankruptcy proceedings for the liquidation of assets by an individual debtor.

There are approximately 1,000 chapter 7 trustees who receive cases and collectively administer over one million cases annually. The trustees are private citizens appointed and supervised by the Office of the U.S. Trustee to administer bankruptcy cases under chapter 7 of the U.S. Bankruptcy Code.

These men and women are vitally important to the operation of our bankruptcy system. However, they have not received a raise in over 20 years. This is especially concerning because chapter 7 is the most popular form of bankruptcy.

There has not been a fee increase to file chapter 7 cases or a raise in the trustees' compensations since 1995. In 2016, chapter 7 trustees collected and distributed over $300 billion in assets. We

must pay our trustees a better wage to ensure that cases are efficiently handled and quality trustees continue to handle chapter 7 cases.

My bipartisan legislation, H.R. 3553, the Bankruptcy Administration Improvement Act, introduced with Congressman Ed Perlmutter from Colorado, would remedy this by raising the compensation for trustees from $60 to $120. This raise would be accomplished by increasing the filing fee for a debtor by $60. This raise is proportional to 2018 dollars. H.R. 3553 also indexes the cost of filing, as well as the trustees' compensation per case, to inflation.

I know there are some concerns with this legislation in regards to the debtor having to pay a larger filing fee. However, this bill does not disturb the court's existing authority under the Bankruptcy Code to waive a filing fee for an indigent filer.

I am open to any ideas for different funding possibilities to increase compensation for chapter 7 trustees, but we must find a way to increase the amount of money that trustees receive for handling the case, otherwise we risk losing a critical mass of trustees willing to do the work required by chapter 7 cases.

I am looking forward to hearing from our distinguished panel on ways to improve this legislation and what their thoughts are on a raise for chapter 7 trustees. Sixty dollars to handle a bankruptcy case is not adequate compensation; 23 years without a raise is too long. I hope that we are able to come together and give the chapter 7 trustees a much-deserved raise.

The Chair now recognizes the Ranking Member of the Regulatory Reform Committee, Congressman Cicilline.

Mr. CICILLINE. Thank you, Mr. Chairman.

Welcome to our witnesses.

Today's hearing concerns the compensation of bankruptcy trustees in cases under chapter 7 of the Bankruptcy Code, which provides debtors with a fresh start through the complete resolution of their debt. In chapter 7 bankruptcies, trustees act as a fiduciary appointed by the Justice Department to ensure that debtors comply with various requirements, including filing documents with the court and surrendering their nonexempt assets for liquidation along with other essential responsibilities.

There are two sources of trustee compensation today. The first comes from filing fees paid by debtors. In addition to paying for legal representation and compulsory debt counseling, debtors must also pay a $335 fee to file for a chapter 7 bankruptcy. Chapter 7 trustees receive $60 of this filing fee, a compensation level that has not been adjusted since 1994.

The second source of trustee compensation is a commission on any assets that can be liquidated and distributed to creditors. In these cases, the trustee may receive a percentage of this distribution on a scale outlined by Section 326 of the Bankruptcy Code.

Because more than 90 percent of chapter 7 bankruptcies are no-asset cases, where the debtor does not own assets that can be liquidated, there is wide agreement that chapter 7 trustees are long overdue for an increase in compensation. But I firmly believe that the solution to increasing trustees' compensation is not saddling consumer debtors with higher filing fees, which have already increased significantly since 2005, particularly at a time when wages

are flat and too many hardworking Americans are living paycheck to paycheck.

John Rao, a leading consumer bankruptcy expert and one of our witnesses today, notes that, and I quote, "Consumers in financial distress typically live hand-to-mouth and have no savings they can rely upon, and it is already an enormous struggle for consumers to come up with the costs needed to file bankruptcy relief," end quote.

There are, however, potential win-win solutions that would increase chapter 7 trustee compensation without adding to the financial hardship of consumer debtors.

The first of these would be revising the statutory formula for payments to trustees in asset cases. This formula has also not changed since 1994 and could be modified to benefit the trustee system without imposing additional financial hardship on consumer debtors. Moreover, as Mr. Rao argues, a fund could be established to ensure an equitable distribution of payments among trustees.

Secondly, there's nothing preventing Congress from reducing other fees paid by consumer debtors as a trade-off for higher trustee compensation. In many ways the amendments to the Bankruptcy Code in 2005 stacked the deck against consumer debtors with mountains of paperwork and other wasteful requirements that have done little to improve the bankruptcy system.

The Government Accountability Office has reported that this requirement may often serve more as an administrative obstacle than as a timely presentation of meaningful options for consumers in dire financial situations without alternatives to bankruptcy. As a result, these burdensome requirements have deterred honest, hardworking families from obtaining bankruptcy relief.

That's why there's ample support among consumer advocates for finding a compromise that eliminates these administrative burdens for consumer debtors, if only in limited cases such as those involving exigent circumstances. Is there any reason why a family facing a home foreclosure or catastrophic medical debt should go through credit counseling before even filing for bankruptcy?

I believe there is room for agreement on this issue, and I'm encouraged by the majority's openness to finding the right solution to this issue. And with that in mind, I thank our panel of esteemed witnesses. I look forward to working together on finding ways to improve the bankruptcy system.

Again, welcome to our witnesses. And I yield the balance of my time.

Mr. MARINO. Okay. Without objection, the other members' opening statements may be made part of the record.

I will begin by swearing in our witnesses before I introduce them.

I ask if you would all please rise, raise your right hand.

Do you swear that the testimony you are about to give before this Committee is the whole truth and nothing but the truth, so help you God?

Let the record reflect that every witness has answered in the affirmative.

Please be seated.

I'm going to introduce, go through everyone's vitae completely, and then we'll come back and start with questions. My colleague and I have to be in two different hearings at the same time, so he is heading out to cover for both of us.

Clifford White III has served as Director of the U.S. Trustee Program since 2006. Mr. White has more than 30 years in Federal service, and most of his tenure has been with the United States Trustee Program, including formerly as the Deputy Director and as an Assistant United States trustee.

Prior to joining the Program Mr. White served as a Deputy Assistant Attorney General within the Department of Justice—there we have something in common, sir—and as an official at two other Federal agencies. He has been recognized with an Attorney General's Award for Distinguished Service and was conferred the Presidential Rank Award of Meritorious Executive in 2006 and Distinguished Executive in 2009.

Mr. White earned his bachelor's degree and his JD with honors from the George Washington University and George Washington University Law School.

Welcome, sir.

Judge Alan Stout was appointed U.S. bankruptcy judge for the Western District of Kentucky on October 25, 2011. Judge Stout is a member of the National Conference of Bankruptcy Judges and currently serves as co-chair of the Legislative Committee.

Judge Stout was a participating bankruptcy attorney in both Paducah and Marion, Kentucky, for 30 years. He also served as a chapter 7 panel trustee for 25 years. Before assuming the bench, he served as the Crittenden County attorney for 21 years and master commissioner of the Crittenden Circuit Courts for 5 years. Judge Stout has previously served as president and on the board of directors of the National Association of Bankruptcy Trustees.

Judge Stout earned his bachelor's degree from Murray State University and his JD from the Salmon P. Chase College of Law at Northern Kentucky University.

And welcome to you, sir.

Neville Reid is a capital partner and co-chair of the Bankruptcy, Restructuring and Creditors' Rights Group at Fox Swibel in Chicago. He has represented a wide array of clients in all aspects of bankruptcy, restructuring, insolvency, and creditors' rights cases and transactions for over 25 years. Mr. Reid's clients include receivers and bankruptcy trustees, distressed businesses seeking to restructure their debt and financial affairs, corporate unsecured creditors, secured lenders, and investors seeking to acquire assets from distressed entities.

Additionally, Mr. Reid has been a bankruptcy panel trustee for chapter 7 and chapter 11 bankruptcy cases for over 23 years. In that capacity he frequently investigates and recovers fraudulent transfers and various assets for the benefit of creditors of corporate entities and individual debtors.

In 2011, Mr. Reid led his firm's representation of the U.S. Treasury Department in closing $1.7 billion of small business lending fund transactions designed to inject capital into middle market financial institutions and stimulate middle market lending as part of the Federal Government's economic recovery strategy.

Mr. Reid has served as one of a select group of bankruptcy trustees in Chicago for over 22 years. He is regularly appointed by bankruptcy judges in Chicago to oversee the liquidation of Chicago area companies for the benefit of secured and unsecured creditors.

Mr. Reid earned his bachelor's degree from Harvard College magna cum laude and his JD from Harvard Law School.

And welcome to you, sir.

Ariane Holtschlag is a partner with Factor Law in Chicago, Illinois. Her practice is focused primarily in the field of consumer bankruptcy and is equally divided among representing trustees, debtors, and creditors in chapter 7 and 13. Ms. Holtschlag also represents individuals and small businesses in chapter 11.

She is testifying as a member of and on behalf of the American Bankruptcy Institute's Commission on Consumer Bankruptcy. She earned her bachelor's degree from Illinois Wesleyan University, and her JD from the University of Iowa College of Law.

Good morning to you.

Attorney John Rao is an attorney with the National Consumer Law Center where he focuses on consumer credit, mortgage servicing, and bankruptcy issues. He is a contributing author and editor of NCLC's "Consumer Bankruptcy Law and Practice," a co-author of NCLC's "Foreclosures and Mortgage Servicing and Bankruptcy Basics," and a contributing author to "Collier on Bankruptcy" and the "Collier Bankruptcy Practice Guide."

Mr. Rao served as a member of the Federal Judicial Conference Advisory Committee on Bankruptcy Rules from 2006 to 2012, to which he was appointed by Chief Justice John Roberts. He is a conferee on the National Bankruptcy Conference, fellow of the American College of Bankruptcy, member of the editorial board of "Collier on Bankruptcy," board member of the National Consumer Bankruptcy Rights Center, commissioner on the American Bankruptcy Institute's Commission on Consumer Bankruptcy, and former board member of the National Association of Consumer Bankruptcy Attorneys and the American Bankruptcy Institute.

He earned his bachelor's degree from Boston University and his JD from the University of California Hastings College of Law.

Thank you, sir, for being here.

Each of the witnesses' written statements will be entered into the record in its entirety. I ask that each witness summarize his or her testimony in 5 minutes or less.

You see these little boxes in front of you. And to help you with them, there are timing lights on it, and I think you get the gist of that. But sometimes, like I do, I get so involved in our conversations that I don't even look at the box or look at things.

So I will diplomatically raise the little gavel here, and when you see me twirling that in my fingers would you please wrap up your statement and then we can get further into your comments during the questioning phase.

So with that, Mr. Stout, would you please like to make your opening statement?

TESTIMONY OF THE HONORABLE ALAN C. STOUT, BANKRUPTCY COURT JUDGE, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY; MR. CLIFFORD J. WHITE III, DIRECTOR, U.S. TRUSTEE PROGRAM; MR. N. NEVILLE REID, CAPITAL PARTNER, CO-CHAIR OF THE BANKRUPTCY, RESTRUCTURING AND CREDITORS' RIGHTS GROUP, FOX SWIBEL LEVIN & CARROLL LLP; MS. ARIANE HOLTSCHLAG, PARTNER, LAW OFFICE OF WILLIAM J. FACTOR, LTD.; AND MR. JOHN RAO, ATTORNEY, NATIONAL CONSUMER LAW CENTER

STATEMENT OF ALAN C. STOUT

Judge STOUT. Thank you, Mr. Chairman, members of the Subcommittee. As the Chairman said, my name is Alan Stout. I'm the United States bankruptcy judge for the Western District of Kentucky.

Let me preface my remarks here today by saying that I am testifying on my own behalf as an individual bankruptcy judge. I do not represent other members of the judiciary, however, some judges have expressed their support for this to me. I do not represent the National Conference of Bankruptcy Judges here today, nor do I represent the Judicial Council or the Administrative Office of the Courts, except for one caveat that I will mention briefly shortly.

Prior to being appointed to the bench in 2011 I was a bankruptcy lawyer. I served as a bankruptcy lawyer for 30 years. I represented debtors in bankruptcy, I represented creditors, I represented banks, I represented credit unions, in all forms of bankruptcy, chapter 7, chapter 11, chapter 13, and even did some chapter 12 farm bankruptcy work. I think all this brings some practical experience that I bring to this issue.

In addition to serving as a bankruptcy lawyer, I was a chapter 7 panel trustee for 25 years. During that time, I administered over 11,000 cases as a bankruptcy trustee, and during the time I was a practicing lawyer I was involved with over 3,000 cases, as I said, representing debtors and creditors, primarily representing consumer debtors in chapter 7 cases. So I think I do have a unique perspective in addition to my 7 years of being on the bench that I bring to this issue.

I support the bill as proposed to provide a $60 increase to the no-asset fees paid to chapter 7 trustees, keeping in mind that over 90 percent of the cases are no-asset cases. The trustees have not had a raise in many years, as the Chair alluded to.

I support passage of H.R. 3553 with one exception. Yesterday, James Duff, in his capacity as secretary of the Judicial Council, sent a letter to the Chair and to the Ranking Member setting forth that the judiciary did regard one aspect of the bill as very problematic in providing for indexing an increase tied to inflation every 3 years.

To the extent that the judiciary has expressed concerns with that, I echo those concerns and do not want to take a position contrary to the Judicial Council or the Administrative Office of the Courts relative to that issue. And so that letter is dated September 25, and I think it is in the record, and would direct attention to that for more specificity.

The whole purpose of filing chapter 7 bankruptcy in a consumer setting is to give debtors, unfortunate debtors many times due to circumstances beyond their control, a fresh start. Some of the most common reasons for consumer bankruptcies are medical bills, uninsured medical bills, or underinsured medical situations, unemployment or underemployment, credit card debt, and small business situations where debtors have failed in small businesses and many times have guaranteed a lot of debt and they have to file chapter 7 to discharge or wipe out that debt.

Another phenomenon we have seen recently is an increase in elderly debtors seeking bankruptcy relief, as well.

And let me point out one thing, that it is critical to note that in regard to this bill there's one component that remains in place. Currently, whenever a debtor files bankruptcy, if their income is below 150 percent of the poverty level they're able to file a fee waiver request, and courts routinely deal with these in what's called in forma pauperis requests where we routinely grant waivers of the filing fee in total. And sometimes, if a debtor seeks a waiver of the filing fee, if we don't grant the full waiver we will allow the debtor to make payments in installments over a period of time to lessen the burden on debtors.

So the fee waiver provision of the code remains in effect, and according to statistics provided by Director White's office, these are granted in about 4—between 4 and 5 percent of the cases fee waivers are granted.

It is no secret that attorneys' fees and other fees and costs have gone up since 1994 when the last fee increase was put in place for the chapter 7 trustees. Debtors' counsel fees have gone up, court-appointed lawyers' fees have gone up, and even compensation for judges has raised. So the trustee fee of $60 has been frozen for 24 years. It needs to be increased for the good and integrity of the bankruptcy system.

Thank you.

Judge Stout's written statement is available at the Committee or on the Committee Repository at:https://docs.house.gov/meetings/JU/JU05/20180926/108455/HHRG-115-JU05-Wstate-StoutA-20180926.pdf

Mr. MARINO. Thank you, sir.

Director White.

STATEMENT OF CLIFFORD J. WHITE III

Mr. WHITE. Thank you. Good morning, Mr. Chairman and members of the Subcommittee. I thank you for the opportunity to appear before you today in support of an increase in compensation for chapter 7 trustees.

The U.S. Trustee Program appoints and oversees about 1,100 chapter 7 trustees who serve as fiduciaries for bankruptcy estates. These trustees liquidate available assets and return approximately $3 billion annually to creditors. As the watchdog of the bankruptcy system, the USTP can attest to the essential role played by chapter 7 trustees in ensuring that debtors receive a fresh start and that creditors receive repayment as entitled by law.

The trustee compensation provisions of the law, as has been noted, have not been changed in 24 years, but over that time there

has been inflation and Congress has added to the trustees' duties. So I respectfully ask Congress to increase compensation so that the bankruptcy system can continue to benefit from the skilled and competent core of chapter 7 trustees.

The basic duties of a chapter 7 trustee are set forth in Section 704 of the Bankruptcy Code, and these include responsibilities that were added by the Congress in amendments passed in 2005. Chapter 7 trustees also support the United States Trustee Program in fulfilling our civil and criminal enforcement responsibilities in the system.

Through their day-to-day administration of cases, trustees often identify cases that warrant U.S. Trustee enforcement actions, including cases of concealment of assets or other fraudulent activities. In my testimony I provide a recent example of a successful criminal prosecution in which a chapter 7 trustee worked closely with our office to investigate the conduct of the debtor's attorney.

It is important to note, as well, that trustees commit a significant amount of time to investigating the financial affairs of all debtors to determine if there are assets available for distribution. Now, in the end, as has been noted, more than 90 percent of cases have no assets to administer, but in some cases that appear to be no-asset cases, the trustee's investigation identifies property that can be liquidated for the benefit of creditors.

For carrying out these critical responsibilities chapter 7 trustees receive compensation from two sources. First, they receive $60 for every case assigned. That no-asset fee is paid from part of the filing fee paid by chapter 7 debtors. And second, the trustees receive a percentage fee based on distributions in asset cases.

The no-asset fee, again, was set in 1994, and if adjusted for inflation alone that fee would be $100. If also adjusted for additional duties of the trustee, then the $120 level contained in H.R. 3553 would be entirely reasonable.

The percentage fee calculation also has not changed in the last 24 years, but in 2005 Congress did attempt to strengthen the percentage fee for asset cases by providing that the bankruptcy courts should award the percentage fee as a commission.

The U.S. Trustee Program has taken the position in court that absent extraordinary circumstances trustees are entitled by law to the full percentage fee. Our legal position has been adopted by two circuit courts of appeals, but some bankruptcy courts have adopted other interpretations that result in lower fees paid to the trustees under the commission system.

There are two important trends in chapter 7 administration that pertain to trustee compensation. First, total compensation paid to chapter 7 trustees, including for legal and accounting services for which they can separately charge a fee in a case, has been declining, and last year total compensation paid to chapter 7 trustees plummeted by 18 percent. And second, the number of applicants who apply for vacant trustee positions has declined significantly, from an average of 58 candidates in 2010 to 20 applicants in 2017.

So although it's difficult to measure the precise impact of diminished compensation, it stands to reason that continued decreases in compensation may threaten the financial viability of trustee oper-

ations and the ability to retain and recruit the highest caliber of trustees.

Now, the cost of raising the no-asset fee would be about $27 million per year at current filing levels. In my testimony I discuss some possible sources that could be considered. As a technical matter, if the no-asset fee is indexed as provided in the bill, the revenue source also should be indexed to avoid a shortfall for trustees or any other recipients from that funding source.

Chapter 7 trustees do an outstanding job administering cases fairly and efficiently, and after 24 years without a raise, chapter 7 trustees deserve an increase in compensation. And I would be happy to respond to any questions from the Subcommittee.

Director White's written statement is available at the Committee or on the Committee Repository at: https://docs.house.gov/meetings/JU/JU05/20180926/108455/HHRG-115-JU05-Wstate-WhiteC-20180926.pdf

Mr. MARINO. Thank you.

STATEMENT OF MR. REID

Mr. REID. Thank you, Mr. Chairman.

During my 24 years as a bankruptcy trustee I have administered over 8,000 cases. I'm testifying here today in support of H.R. 3553 on behalf of the National Association of Bankruptcy Trustees and its 887 members.

The NABT, as to which I am currently the vice president, is the leading national association representing bankruptcy trustees. Trustees in turn are the front line of the chapter 7 bankruptcy system. We investigate the truth of a debtor's bankruptcy petition disclosures, pursue and liquidate assets for the benefit of a debtor's creditors, make criminal referrals where we find debtor misconduct that may otherwise go undetected, and perform numerous other responsibilities that enable the bankruptcy system to function.

The NABT strongly urges the passage of this bill in order to reduce the economic burden that trustees have been carrying for the benefit of the bankruptcy system for at least the past 23 years, during which time their responsibilities under the Bankruptcy Code have increased but their compensation in real terms has decreased.

Trustees routinely incur substantial nonpayment risk when they investigate potential assets for creditors, but don't always recover the value of their time when those assets don't materialize or when they collect information supporting criminal referrals for government attorneys.

When Congress enacted BAPCPA in 2005 it effectively put in place an unfunded mandate by requiring trustees to perform even more responsibilities in bankruptcy cases without increasing their compensation in no-asset cases, thus further deepening trustees' inherent nonpayment risk. Since approximately 90 percent of all chapter 7 cases are no-asset cases the only source of recovery for trustees in most cases is the no-asset fee, and even that fee is not available in cases where the debtor's filing fee is waived.

Since the no-asset fee has remained constant since 1995, during which time inflation has increased by 64 percent, in real terms trustees have been required to do more for less.

Despite the real decline in their compensation, trustees have faithfully created enormous value for creditors, including tax authorities, and for debtors at costs substantially below what the market would normally require. Some of the main creditors benefiting from the collections by trustees are Federal and State taxing authorities. In 2016 trustees distributed roughly $170 million to taxing authorities from their asset cases.

Payments to tax creditors also benefit debtors because debtors' tax debt would normally be nondischargeable and would survive their bankruptcy. Yet few debtors have the ability of a trustee to carry nonpayment risk and collect assets in order to reduce tax debt. Without the trustee, neither the taxing authorities nor the debtor would likely be able to reduce the unpaid tax liability.

Yet again, the trustee does this at a cost to herself since ordinarily a creditor's private collection agent would charge a 33 percent contingency fee to collect an asset, but trustees typically receive in compensation in their asset cases less than 10 percent of the value of the total assets they collect.

The increase in the no-asset fee, while certainly not eliminating these economic burdens on trustees, will undoubtedly help to alleviate them.

In addition, the fee increase will lower the growing risk that experienced trustees will begin to leave the trustee practice altogether given its deepening unprofitability. The total number of trustees declined by 30 percent since 2002. The loss of even more experienced trustees will limit the valuable mentoring that veteran trustees provide to new trustees and will hurt communities who substantially benefit from the dollars that trustee collections inject into their local economy.

Some have argued that debtors who don't receive a fee waiver still cannot afford the proposed filing fee increase and that other ways must therefore be found to fund the trustee fee increase. These arguments overlook the effect of the debtor's discharge. For those debtors who pay the filing fee and receive their discharge the elimination of many thousands of dollars of discharged debt, frequently hundreds of thousands of dollars of debt, will in nearly all instances create at least $60 of additional cash flow for the debtor to cover the incremental filing fee, thus still making bankruptcy a tremendous bargain for debtors.

Ultimately the increase in the filing fee is the only feasible way to ensure long-term funding for the badly needed trustee fee increase. The NABT has addressed other alternative proposals in the 20 years it has been working on this issue only to find that such proposals put more burdens on taxpayers, Federal agencies, or creditors that those entities should not or apparently will not bear.

For all of these reasons, the NABT requests that Congress pass H.R. 3553. Thank you, Mr. Chairman.

Mr. Reid's written statement is available at the Committee or on the Committee Repository at: https://docs.house.gov/meetings/JU/JU05/20180926/108455/HHRG-115-JU05-Wstate-ReidN-20180926.pdf

Mr. MARINO. Thank you.

Attorney Holtschlag.

STATEMENT OF ARIANE HOLTSCHLAG

Ms. HOLTSCHLAG. Chairman Marino and members of the subcommittee, thank you for the opportunity to appear here today. I'm a partner at the law firm of the Law Offices of William J. Factor with offices in Chicago and Northbrook, which I believe is Representative Schneider's stomping grounds. I am admitted to practice in the State of Illinois, and I have practiced in the field of consumer bankruptcy for over 10 years.

I am testifying here today as a member of and on behalf of the American Bankruptcy Institute's Commission on Consumer Bankruptcy. The American Bankruptcy Institute, the ABI, is the world's largest association of insolvency professionals, made up of over 11,000 members in multidisciplinary roles, including attorneys, bankers, judges, lenders, professors, turnaround specialists, accountants, and others. These members represent debtor, creditor, and other stakeholder interests. Founded in 1982, ABI is a nonprofit and nonpartisan organization and is organized under the Internal Revenue Code Section 501(c)(3).

ABI also plays a leading role in providing congressional leaders and the general public with an unbiased reporting and analysis of bankruptcy regulations, laws, and trends. Although ABI is not an advocacy group, it is often called on to testify before Congress, analyze proposed bills, and conduct periodic briefings for congressional committees, legislative staff, and other government regulators and the media.

In December of 2016, the ABI's board of directors passed a resolution creating the Commission on Consumer Bankruptcy and charging that commission with researching and recommending improvements to the consumer bankruptcy system that can be implemented within the existing structure.

The 17-person commission is chaired by retired U.S. Bankruptcy Judges William Brown and Elizabeth Perris, with more than 50 years of combined judicial experience. The commission reporter is Robert Lawless, the Max L. Rowe Professor of Law and co-director of the Program on Law, Behavior & Social Science at the University of Illinois College of Law.

Commission members serve without compensation. The commission is funded by grants from the ABI Anthony H.N. Schnelling Endowment and the Endowment for Education of the National Conference of Bankruptcy Judges.

After soliciting public feedback, commission members identified more than 50 discrete issues for study and divided these issues among three advisory committees composed of 52 bankruptcy professionals. The commissioners and the committee members represent diverse stakeholder interests in the bankruptcy system, including attorneys who represent primarily debtors and attorneys who primarily represent creditors, as well as chapter 7 trustees, chapter 13 trustees, retired bankruptcy judges, government officials, and academics.

Compensation for chapter 7 trustees was one of the issues identified for study. The commission and its committees began their formal study in April of 2017. The commission conducted seven public meetings in which we have heard from nearly 80 expert witnesses and received more than 130 written statements. In the comments

and written statements to the commission the need to raise trustee compensation enjoyed almost unanimous support.

The commission plans to release its final report in the spring of 2019. The work will be the product of an open and collaborative process aimed at achieving consensus among these diverse stakeholders. Indeed, only recommendations that are approved by a two-thirds majority of the commission will become part of the commission's final report.

The commission did not intend to make public any recommendations before issuance of its final report, however, because it completed its deliberations on the issue of chapter 7 trustee compensation and because of the importance of the topic to the operation of the bankruptcy system we are releasing this statement at the invitation of the Subcommittee.

The recommendations from the commission are as follows. With respect to chapter 7 trustee compensation the commission recommends that compensation should be increased for trustees to $120 per case with the increase in the fee coming from bankruptcy filing and other court fees already paid into the general treasury. These bankruptcy filing and other court fees should be placed into a special fund earmarked for trustee compensation.

And secondly, that the breakpoints for trustee compensation in asset cases should also be adjusted to allow for more trustee compensation. Specifically, a 25 percent commission is currently applicable to the first $5,000 in distributions in a case. The commission recommends that this breakpoint be increased to $10,000. A 10 percent fee is currently in effect for distributions between $5,000 and $50,000. The commission recommends that this be changed to distributions between $10,000 and $100,000.

Finally, the commission recommends that the percentage fee on distributions exceeding $1 million be increased from 3 percent to 4 percent. The 5 percent applicable commission on distributions between $100,000 and $1 million would not change.

These are the recommendations of ABI's Consumer Commission. Thank you.

Ms. Holtschlag's written statement is available at the Committee or on the Committee Repository at: https://docs.house.gov/meetings/JU/JU05/20180926/108455/HHRG-115-JU05-Wstate-HoltschlagA-20180926.pdf

Mr. MARINO. Thank you.

Mr. Rao.

STATEMENT OF JOHN RAO

Mr. RAO. Mr. Chairman, members of the Subcommittee, thank you for inviting me to testify today on H.R. 3553. I am here today testifying on behalf of the low-income clients of the National Consumer Law Center and also on behalf of the National Association of Consumer Bankruptcy Attorneys.

The organizations and their clients that I represent fully support the goal of this bill. Chapter 7 trustees should receive an increase in compensation. The proposed increase, an initial $60 per case, is fair and appropriate.

The real challenge, however, is coming up with the means to pay for this increase that is spread equitably among those in the bank-

ruptcy system and not taxpayers. Our opposition to H.R. 3553 is that it looks only to debtors and their families who are already experiencing financial hardship to fund the increased filing fees and does not consider alternative methods of funding.

In addition to raising the current filing fee to $395, it provides that the trustee portion of the statutory filing fee will be subject to an inflation adjustor every 3 years. While we don't oppose that, the bill does not address how that will be funded. The Judicial Conference, in our view, will be forced to increase filing fees every time there's an upward adjustment based on the inflation. The next inflation adjustment will likely bring the filing fee over $400, which is more than what civil litigants pay currently to file a civil case in Federal District Court.

Since 2005 we have seen that there are many consumers who need bankruptcy relief but are simply too broke to file. This is because the costs of bankruptcy have increased significantly since the 2005 Bankruptcy Act. As Ranking Member Cicilline mentioned, there's been increases in filing fees, in paying for credit counseling and debtor education, there are a lot of additional filing requirements, which has increased legal fees, all of which has been documented by the GAO study that was done about the BAPCPA costs.

As a result, the total cost of filing bankruptcy of chapter 7 cases has doubled since 2005 from under $1,000 in most cases to over $2,000 or more, which is really beyond the reach of many.

Some may say that the $60 filing fee increase is modest and would not be a barrier to access to bankruptcy relief. This does not consider that so many consumers just do not have the savings, again, as Ranking Member Cicilline mentioned. Even in these good economic times a recent Federal Reserve Board survey showed that 41 percent of consumers could not or are not able to come up with $400 for an emergency. It is an enormous struggle for consumers to come up with the $2,000 or more to file a case. An additional $60 only makes this more difficult.

Several witnesses said that there's little impact on court access because there's filing fee waivers. Well, there's only in most cases, even since 2005 in the 13 years, there's only less than 5 percent of consumers who actually get fee waivers, and the increase has been from about 2 percent to 5 percent. So very few consumers actually get those.

So what are the alternatives? One way to raise funds would be to adjust the breakpoints, as the ABI commission report has suggested. My written testimony provides slightly different breakpoint adjustments, but it could help to fund, easily help fund the $60 increase.

And some have suggested that this would not be helpful to trustees who are in States where there are not a lot of asset cases. My recommendation is that a portion of the trustee commissions be put into a fund and redistributed to all trustees. I think that would be a way to ensure that everyone would get the increase under this bill.

Another alternative method would be to require creditors to pay a small filing fee of less than $5, and small creditors could be exempted from it when they file a proof of claim in a case. Mr. Reid has mentioned that trustees do a great job of collecting debts for

creditors and they do it at a lower cost than what those creditors would pay outside of bankruptcy. Why not have them pay a small $5 for when they file a proof of claim to help fund this?

And finally there are other methods of reducing the costs by reducing the cost of filing bankruptcy and, again, Ranking Member Cicilline mentioned those some of those in his opening statements.

In conclusion, NACBA and NCLC value the role of chapter 7 trustees, however, it is critical that financially distressed consumers not be asked to bear this increase alone.

Thank you.

Mr. Rao's written statement is available at the Committee or on the Committee Repository at:
https://docs.house.gov/meetings/JU/JU05/20180926/108455/HHRG-115-JU05-Wstate-RaoJ-20180926.pdf

Mr. MARINO. Thank you.

We will now move into the questioning phase of our hearing, and I will recognize myself to begin the questioning.

Director White, in your written testimony you stated that a $60 raise in the chapter 7 debtor filing fee would mostly represent an inflation adjustment plus a fair adjustment to account for trustees' added workload in cases today. Do you, therefore, think that the approach in the bill is sound, simply to adjust one time now for those reasons than adjust for inflation going forward?

Mr. WHITE. I think that either alternative is better than the status quo. There is certainly a logic to the indexing.

The point I made in the oral statement was simply I think there's a technical change that should be made in the bill so that whatever the increase is for the no-asset fee that the source of revenue to fund that fee also be adjusted similarly so that it is indexed as well. I think that's a technical, that's a technical fix.

Mr. MARINO. Yes, you are right.

Mr. WHITE. But the bill makes perfect sense.

Mr. MARINO. If we were to amend the bill to rely partially on other sources or funds for a raise for chapter 7 trustees are you aware of other sources of funding that the Department of Justice or elsewhere in the Federal Government that could help to supply the needed funds?

Mr. WHITE. Well, in the written statement I identify that what is in the bill now is perfectly reasonable with regard to the filing fee, but it does fall disproportionately, [rather] entirely, on the debtors. There is the compensation, which has the commission fee, which has the downsides that Mr. Rao pointed out, plus the fact it does not incentivize the investigation in no-asset cases, which is so critical. It would only affect the asset cases, and we need the trustees to be paying attention to the no-asset cases.

But there are scores of fees that are charged by the court system for those participants in the bankruptcy system, and all are probably worthy of some consideration to reach the right balance. Everyone individually that has been suggested, including what is in the bill now, makes perfect sense.

I would like to perhaps go beyond and just make one point, because it has been in at least one of the witness' testimony, and that is why not offset the amount of money through eliminating the

credit counseling requirement that was imposed in 2005. I think that would be unwise.

Mr. MARINO. Thank you.

Attorney Rao, asset cases tend to be concentrated in the more prosperous and urban districts. Doesn't that mean that your proposal to fund a chapter 7 trustee raise out of funds raised in asset cases would discriminate against trustees and ultimately debtors in poor and rural districts? How could that be fair?

Mr. RAO. Yes, Chairman Marino, I agree that the asset cases and how they're recovered do vary from State to State. It is not only in large urban areas, but it also depends upon the exemption scheme in particular States. And, in fact, a lot of the small asset cases are trustees recovering earned income tax credits and tax refunds that low-income debtors have.

So my proposal, as I see it, is that we can increase the breakpoints and then have, as I have mentioned in my testimony, a fund that would IN a very small portion of the trustee commissions, I would say even less than 5 percent of all commissions could be paid into a fund and that could be distributed to all trustees to pay the $120 increase.

And I disagree that it would change the incentives for trustees. That small adjustment would hardly make a difference for trustees and they would continue to be incentivized to pursue asset cases.

Mr. MARINO. But do you think that the court is not adequate in determining who is indigent and who would ask for their fees to be reduced or completely eliminated?

Mr. RAO. Well, I'm sorry, you're asking about the——

Mr. MARINO. If a person can request in forma pauperis if they can't afford this.

Mr. RAO. Yes, I mean, the issue with the fee waivers is a different one. In that situation, as I said, very few debtors actually seek it, and for those who do seek it I have looked at, unfortunately, a lot of the statistics on this, and it really varies. In some districts debtors do receive in forma pauperis relief. In other districts, even though there may be a very high poverty level in that district, they do not receive them, and it is because it is up to the discretion of the judge.

And it's not just the income guidelines, but there's also a test that the judge would review as to whether or not the debtor has the ability to pay the filing fee in installments. And so in some districts they're denied frequently and some debtors don't even ask for the fee waivers because they know that they're probably not going to get them.

Mr. MARINO. It seems like we all agree on the raises are needed, much needed. The path to get there, there seem to be various paths. That's one of the reasons why we're having this hearing today, because as the director pointed out some of this can be done from the technical aspect of revising laws as we move forward.

My time has more than expired. I now recognize the gentleman from Georgia, Congressman Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. Chairman, I would like to submit for the record a letter dated September 25, 2018, from the Judicial Conference of the United States entering its opinion on H.R. 3553.

Mr. MARINO. Without objection.

This material is available at the Committee or on the Committee Repository at: https://docs.house.gov/meetings/JU/JU05/20180926/108455/HHRG-115-JU05-20180926-SD004.pdf

Mr. JOHNSON. And thank you. I thank the witnesses for appearing.

In 2005, prior to the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act, the chapter 7 filing fee was $155. There have been three statutorily mandated filing fee increases since 2005. The filing fee has more than doubled and now stands at $335.

The Bankruptcy Abuse Prevention and Consumer Protection Act has imposed various other expenses that debtors must pay in a chapter 7 case, $25 to $40 extra for mandatory prebankruptcy credit counseling that has been found to be ineffective and a waste of taxpayer money basically, a waste of debtor money. Another $20 to $25 for postbankruptcy financial management training, that has dubious results, as well.

And also the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act has resulted in an increase in attorneys' fees to debtors due to the additional responsibilities and documentation requirements that have been imposed on debtors' attorneys.

So this is a substantial increase in costs to debtors. And I think most of us here today believe increasing the fee for the chapter 7 trustee is definitely reasonable and appropriate, but we disagree on how that increase should be paid or, in other words, who should pay it. Should it be the debtors or should it be an across-the-board situation.

We are really talking about how we treat some of the most disadvantaged people in our society at a key and difficult time in their lives. That's really what we're talking about.

Mr. White, trustees are appointed as fiduciaries for creditors in bankruptcy proceedings. Isn't that correct?

Mr. WHITE. Yes, although I would go beyond appointed as fiduciaries for creditors. It is for the whole estate, so whoever may be a stakeholder.

So we view the role of the trustee to also be looking out for the integrity of the whole system, which is why they will report to us when they identify cases of fraud or abuse, whether that be fraud or abuse or improper actions by debtors, creditors, or others.

Mr. JOHNSON. It's basically fraud and abuse on the part of the debtor you're looking for?

Mr. WHITE. I don't agree with that, respectfully, sir.

Mr. JOHNSON. You're not looking for fraud and abuse by creditors. You're looking for it on behalf of or on the part of or at the instance of debtors, and I mean, that's just a fact.

Mr. WHITE. May I respectfully——

Mr. JOHNSON. They have other responsibilities, but you must admit that trustees are appointed as fiduciaries for creditors among their other responsibilities, and your due diligence efforts benefit creditors. Isn't that correct?

Mr. WHITE. In part, but may I just have a complete—I think it's very important to note the U.S. Trustee Program, in partnership

with the chapter 7 trustees, in looking out for the integrity of the system, we have brought, in part because of information provided by chapter 7 trustees, actions that have resulted in tens, hundreds of millions of dollars of settlements with financial [institutions], including one that we announced 2 days ago.

Mr. JOHNSON. Those come out of the hides of the debtors, not the creditors. It's the debtors who have been found to be hiding assets or that kind of thing.

Mr. WHITE. In some cases, but the settlement this week, for example, on robo-signing of claims, was where $[5] million is going to be returned to debtors.

Mr. JOHNSON. And is that a chapter 7 or is that a——

Mr. WHITE. They were 7 and 13, but was primarily 13. But if you look at the history of the Program it has been, I think, very much balanced with regard to looking out for the integrity whoever the wrongdoer may be, including cases——

Mr. JOHNSON. Well, I guess that's my point, and I only have 5 minutes, and I'm trying to have a discussion.

But I guess my point is to show that debtors have borne an inordinate share of administrative costs that are associated with these filing fee increases. Those are paid by the debtor. And we need to find a way to shield the debtor from further exposure to unilateral cost increases.

And with that, I will yield back.

Mr. MARINO. Director White, would you like to respond in any way?

Mr. WHITE. Just to reinforce the importance of looking out, as trustees do, for wrongdoing on the part of any of the actors in this system.

If I could also respond further, respectfully, Mr. Johnson, I don't think it is established by studies that credit counseling is ineffective. We administer that program, and there were a lot of concerns about it when it was enacted in 2005, and we have addressed some of the major concerns. There's universal access. The cost of credit counseling averages about $25.

And what we do know, to the extent the data are not dispositive, but what the impact may be is 10 to 15 percent of certificates that are issued are not used in bankruptcy, at least not immediately. So that's not dispositive, but it is some indication maybe the counseling has some positive impact.

One of the concerns I have, because I think probably our Program needs to look at ways we can enrich the quality of counseling because it was a consumer protection measure, that's what it was designed to be, so debtors were not going to be misled by non-attorney petition preparers or others.

But we have, by the criticisms that have been made by the consumer bar sometimes, I think a chilling effect on the receptivity of debtors to get benefit from the credit counseling. And furthermore, just last month we successfully brought a case in bankruptcy court where a bankruptcy mill, a firm doing a lot of cases, was directing their staff to take the credit counseling and filing false certificates, and those were the findings of the bankruptcy court.

So I think that for credit counseling to have its full positive impact we in the Program need to reevaluate how could we make it

better. But I don't share the view, respectfully, sir, that studies show that it is not and cannot be more effective.

Mr. JOHNSON. And you do not share the view——

Mr. MARINO. The gentleman's time has expired. We're going to have a second round of questioning.

Mr. JOHNSON. If I could just follow up on that one point, Mr. Chairman.

Mr. MARINO. Briefly.

Mr. JOHNSON. Yes. So you disagree with the GAO study that found that this requirement for credit counseling presents more of an administrative obstacle then as a timely presentation of meaningful options to debtors, you disagree with that conclusion?

Mr. WHITE. I think that the conclusions of the GAO were not just left there. I would have to go back to the study. But I don't believe that it is finding that the credit counseling can be of no utility.

I totally agree with you, Mr. Johnson, and our practice in the U.S. Trustee Program shows a great sensitivity to the fact that debtors are in dire financial distress overwhelmingly, and any burdens on them ought to be carefully considered. I totally agree.

I'm trying to present the view, however, that credit counseling is designed to be of assistance, and in part through the way we have administered the program, its cost is only $25, not nearly on average, not nearly what was anticipated when that law was passed in 2005.

Mr. JOHNSON. Thank you.

Mr. MARINO. All right. Thank you.

The Chair recognizes Congresswoman Handel from Georgia.

Mrs. HANDEL. Thank you, Mr. Chairman. And thank you to all the witnesses.

Let me first apologize for not hearing your testimony but know that I have read it, so I appreciate that, and your willingness to share it ahead of time.

I am going to continue on the line of the credit counseling for just a minute, Director White. It seems to me that credit counseling is an important component of helping anyone who is faced and is experiencing dire financial circumstances sort of better understand how they can, one, move out of that and, secondly, better protect themselves going forward to ever facing that type of stress and strain ever again.

So, as you talk about enriching the quality of the counseling, can you just expand on that a little bit more of things that you are doing and ways that we can do that?

Mr. WHITE. Well, you are correct that the purpose of credit counseling is to see if there are alternatives to bankruptcy. So we do have some indications that, when that course is taken, there are statutory standards and that it does have that effect without there being strong data. That would take a longer, more extensive study.

I think, though, after more than 10 years, it probably would be a good idea if the U.S. Trustee Program could look for ways to see if the curriculum could be enriched, and the way that we—the way that we regulate, if you will, the credit counselors to ensure that kind of consistency.

But it is of concern that if you have the debtor bar telling the client that this is a useless exercise, it becomes a self-fulfilling

prophesy. So we also need to be careful, we do in the U.S. Trustee Program, on the enforcement side, that if we see that attorneys are overreaching, as they did in the case we brought last month—or successfully concluded last month—we are taking enforcement action to have a deterrent effect, because credit counseling is designed to be for the benefit of the debtor. It is not designed to be a penalty.

Mrs. HANDEL. What is the penalty——

Mr. WHITE. The penalty that is——

Mrs. HANDEL [continuing]. For a lawyer who would be——

Mr. WHITE. In that case, there was injunctive relief that was imposed and monetary penalties on that law firm.

Mrs. HANDEL. Okay. Might we be able to expect some recommendations from you on specifically how to revamp a credit counseling program?

Mr. WHITE. If we have any specific suggestions that are ripe, I would be happy to share them with the Subcommittee.

Mrs. HANDEL. Okay. Great.

And one more question for you.

The Department of Justice recently filed a statement of interest in an asbestos-related bankruptcy case. As you know, this Committee has spent some considerable time and effort trying to understand fraud in the asbestos trustee created during the bankruptcy.

How concerned is your office about the fraud in these types of trusts?

Mr. WHITE. We have been concerned. I have testified before this Subcommittee before that the risk of fraud and abuse is greater because there is essentially not a policeman for the trust—, because they are created and operate postbankruptcy—neither by the court nor by the U.S. Trustee.

Two weeks ago, for the first time, the Department did file a statement of interest in a case looking at the front end, when the bankruptcy court still has greater authority over the case, to say that no plan establishing a trust should be approved unless there are greater transparency and antifraud provisions, unless there is a greater disclosure of attorneys' fees and administrative costs so that victims are not gouged through unnecessary costs, and standards to prevent conflicts of interest.

And I can tell you that just today, we filed, for the first time, in a bankruptcy case in the District of New Jersey, an objection to the appointment of a future claims representative in a case. A future claims representative has the duty in working with the debtor and the claimants to design a plan of organization, a trust plan, that will prevent fraud and abuse so that that fund is not depleted by wrongful filings and, therefore, allow there to be less money available for distribution to claimants who become sick later. So, in that case that we have filed that objection, we assert that there are conflicts of interest because of connections of the future claims representative candidate with the plaintiffs' bar. Independence is key. Independence and transparency are key.

Mrs. HANDEL. Thank you very much.

Mr. Chairman, I yield.

Mr. MARINO. Thank you.

The Chair now recognizes the Ranking Member, the Congressman from Rhode Island, Mr. Cicilline.

Mr. CICILLINE. Thank you, Mr. Chairman.

And I want to begin with you, Mr. Rao. If you would, respond to the Director's statements just a few moments ago that the credit counseling benefits—that credit counseling benefits the bankruptcy system. And I would just like to know your thoughts if you could respond to that. I know you have written and thought about that a lot.

Mr. RAO. Yes, Ranking Member. Thank you.

Yes, I respectfully disagree with Director White. I think particularly when you are talking about the credit counseling that is required before filing bankruptcy, I think most studies have shown that the consumers usually delay their decision to file bankruptcy for a very long time, and it is usually at the very—when they have explored all options, and it is just at that point they have no other way of getting out of their debt problems, and then they decide that they are going to consider filing bankruptcy.

And I think all the studies show that requiring credit counseling at that point is just too late. There are no viable alternatives for them other than filing bankruptcy. People do not do this lightly. And they have considered options before that.

Director White mentions that—I think it was about 15 percent of consumers get certificates but then don't file. There's lots of reasons why that could happen. Most likely because of all of the costs of filing bankruptcy—they may not have been able to come up with all the money that they need to file bankruptcy—or that the filing requirements themselves are so difficult that they just do not go that route or delay it again for the future. So I think looking at that statistic proves nothing really at all.

I do think there is some value to the debtor education course which comes after the debtor files bankruptcy. And I think studies have shown, and clearly in the clients that we interact with, do find the value in that. It helps them to look at how to stay out of financial trouble after they go through the bankruptcy system. But the pre-filing credit counseling is just not helpful.

Mr. CICILLINE. Thank you.

And you have also said, Mr. Rao, that the 2005 amendments to the Bankruptcy Code substantially increase the demands on debtors and their attorneys. Could you speak a little bit about what that means and what the implications are and what some of those burdensome requirements are and what we might do to fix that?

Mr. RAO. Yeah. There is really quite a few of them, but I think the most prominent one to discuss is really the requirement that debtors and their attorneys need to calculate. So, in most cases, debtors who file bankruptcy are below the median income in their State, and, therefore, they are not really subject to the means test. But even to get to that safe harbor, they have to prove what is referred to as their current monthly income is below that level. And to do that, they have to collect 6 months of pay stubs and collect a lot of information. And the other problem with this is that it is constantly changing. And they have to be very precise on the day of filing that that look-back period of 6 months, that income is calculated perfectly, or they run the risk of a challenge and so forth.

So, if they are struggling to collect the money to file and things are changing in their life and they give the documents to the attorney, but then they can't file, there is a delay, they have got to go back now and collect more paperwork, it is just—the whole process is very burdensome and costs money. I mean, there's just quite a few other things as well, but that is one of the more difficult ones.

Mr. CICILLINE. And just to return back to your first point. The GAO back in 2007 found that the pre-petition credit counseling required as a result of the 2005 amendments to the Bankruptcy Code was not very useful, particularly when debtors are in dire financial distress, which I think is exactly the point you made. So that is confirmed by the GAO report.

Mr. RAO. Yes.

Mr. CICILLINE. Thank you.

And, with that, I yield back, Mr. Chairman.

Mr. MARINO. The Chair recognizes now the Congresswoman from Florida, Congresswoman Demings.

Mrs. DEMINGS. Thank you so much, Mr. Chairman. And thank you to all of our witnesses for being with us today.

We have heard it said, a few times now, I think we are all in agreement that there does need to be an increase in the compensation to keep good qualified trustees interested in doing this job. Judge Stout, you talked about how you worked in all forms of bankruptcy, I think for over 25 years. So certainly I am going to lean on your expertise as we discuss these issues.

Do you believe that passing the cost on, of the increase, to the debtors is the most viable option? And if not, I would like to hear your opinion on some other options.

Judge STOUT. No, I think it is the most viable option. And I don't think increasing the filing fee by $60 will deter access to the system for debtors.

There has been a lot of talk here today about the added burden Mr. Rao talked about on debtors' counsel as a result of the changes put in effect in 2005. Yes, there is a lot more documents that are required to be turned over, but there is a flip side of that too. Yes, the debtor is required to provide a lot more documents to the trustee. But then the trustee has to take the time to examine those documents and review them—the bank statements, the payment advices and all these things.

So, as a result of the added time that lawyers are having to take to get everything together for a chapter 7 to successfully be filed, the attorneys' fees have increased. And I think that is accepted here. I think Mr. Rao said that the fees have gone up to about $2,000 now. In my area, they are not that high, but they are significantly higher than they were in 2005.

So the attorneys' fees have gone up, but then the trustee is not being compensated for all of the added time they are having to put in, between the trustee and their staff, reviewing these documents and following up on all the debtors' advices.

Mrs. DEMINGS. And passing some of the costs on to the creditors is not a viable option, in your opinion, for what reason?

Judge STOUT. Certainly not for asking a creditor to pay a fee to file a proof of claim. I don't think that is practical at all.

You know, creditors do pay some fees now whenever they seek to modify the automatic stay, to file a motion to modify the stay, or terminate the automatic stay. They are required to pay a filing fee. And there are other filing fees that creditors pay for filing certain types of actions, adversary proceedings and so forth, in the cases. And I don't know if those could be adjusted.

Frankly, I don't have enough background as an appropriator or as a legislator to really get into some of the minutia of some of these fees and how they are generated and how they are broken down. But I do believe that the most practical way to deal with this is just simply increase the filing fee. And I don't think it will affect access to the system.

Mrs. DEMINGS. Mr. Reid, you talked about a number of trustees have declined significantly, I believe you said, by about 30 percent.

Mr. REID. Since 2002.

Mrs. DEMINGS. Certainly compensation is, I think, a main reason for that. But are you aware of other reasons why you have had a significant decrease that may not be related to compensation?

Mr. REID. Well, I don't know all the reasons why that number may have decreased. Based on feedback we have gotten from our membership, certainly, the increasing unprofitability of the practice is a consideration. There has also been some attrition where trustees have aged and retired and the trustee's office has decided not to fill those positions. And there also has been a decline in filings for a certain period of time.

So I think there are multiple factors. But certainly, one of the factors that has contributed to it has been, just anecdotally, the increasing unprofitability of the practice. I believe Mr. White has also commented on the number of new applications for the trustee program. It might be helpful to have him comment on whether people are actually showing as active interest in the program as they have historically. That is also another indicator.

Mrs. DEMINGS. Mr. White. Director White.

Mr. WHITE. Yes. Thank you.

We have found that 7 years ago there were about 58 applicants for every trustee opening, and that is down to about 20 now. So that is a very precipitous drop over that period of time.

I had occasion to meet with about 50 of our field office heads a couple months ago. And in talking about our trustee oversight responsibilities, one of the main concerns they raised to me is something that Mr. Reid just suggested, which is retirements. If we face a wave of retirements any time in the next few years of chapter 7 trustees with the fact that it may be seen as a less desirable position as evidenced by the smaller queue in line for those for a position, then the system is in some peril.

Mr. REID. Congresswoman Demings, if I may add to that.

Mrs. DEMINGS. Please, go ahead.

Mr. REID. I have been doing this for 24 years as a trustee. And one of the things that was very helpful to me as a new trustee was the mentoring that I received from veteran trustees. And that is one the intangibles here that is extremely important. It takes a while to learn how to do this job. It really does.

Mrs. DEMINGS. Is that a formal program, mentoring program?

Mr. REID. It probably varies by district. In Chicago, they are superb at having the veteran, older trustees mentor the younger trustees. We get together for meetings. And all the trustees know that you can call them at any time.

I can say without a doubt that, over my 24 years, that is extremely valuable. And it has also been rewarding, because now that I am older, I guess more gray hairs, I can mentor younger trustees. That is an extremely valuable part of this system that wouldn't necessarily appear in statistics but is very real.

Often in these cases, Congresswoman, we have to deal with a lot of very hurt people, a lot of hostility. There is a lot of what you may call projection where people, because they are hurt, they project that hurt on the trustee. The trustee really has to learn how to handle stress. You have to be the calmest person in the room. It takes a while to develop that equanimity.

Again, it is intangible. As the Director says, there will be loss if we don't make—if we don't keep this an economically viable program.

Mrs. DEMINGS. Thank you.

Thank you, Mr. Chairman, I yield back.

Mr. MARINO. Attorney Holtschlag, could you give us a day's worth of operations in the work that you go through in preparing these cases and then getting them before the court?

Ms. HOLTSCHLAG. In representing consumer debtors?

Mr. MARINO. Yes.

Ms. HOLTSCHLAG. So this would be certainly my own experience. I am here today testifying on behalf of the American Bankruptcy Institute. So, in answering your question, I would be relying on my own experience, not speaking on behalf of the ABI.

Mr. MARINO. Sure.

Ms. HOLTSCHLAG. It is very difficult to file on behalf of debtors. I have been very fortunate in my practice. In my experience, the clients that I have had have the money to file for bankruptcy, which is nontrivial as so many have discussed today. To pay my fees to pay the court's fees, it is expensive. And there are certainly those out there that are too broke to go broke, I suppose.

The paperwork is immense. The means test, the changes in 2005, a lot of practitioners got out of the field in 2005 because of those new regulations and the increase in the amount of work that is required.

I think the bar is up to the challenge, does the work. And I think the consumer debtors that file are very much in need of the relief that they seek. And I think that the trustees are very much deserving of the raise that is contemplated as recommended by the ABI because of their service. And that service is provided not only to creditors but to the debtors also. In conducting that meeting, the talent and skills that they bring to conducting the meeting of creditors, which is the one and only time that debtors typically appear before anybody in the system in chapter 7, so the trustee is very much the face of the proceeding for the average consumer debtor. And so having talented individuals that are fairly compensated in that role, for me as a consumer debtor's attorney, is essential to the process.

Mr. MARINO. So, if I could pin you down, to a certain extent, what are you talking about hourwise? How many hours in a simple bankruptcy where there are no assets?

Ms. HOLTSCHLAG. I would say at least 10 hours of my time to prepare the case for filing. I think that is involving certainly calculation of the means test, preparation of the schedules, which are extremely intensive, disclosing everything in every possible way.

So I would say my personal average, which is anecdotal and no way statistically significant across the board, it is 10 hours to prepare a case through the point of case filing.

Mr. MARINO. Thank you.

Director White, something that has come to my attention, and I wonder if you could respond to this. I have heard that there is a substantial amount of unclaimed funds at DOJ that perhaps could help distribute the cost, or defer the cost, to a certain extent, for those—not only for the increase in the rate for your individuals but deferred cost for the person claiming bankruptcy.

Mr. WHITE. The unclaimed funds are not held by the Department of Justice. They are held by the court system. And the courts have actually a task force looking at whether or not the administration of that system is optimum.

As I understand it from information provided by the courts, about $300 million is being held in unclaimed funds, and it increases about $10 million per year. And those occur when a trustee gets a returned check, for example. The creditor cannot be found. But those are not DOJ funds.

I also am not expert in whatever legal issues there could be with regard to the propriety of then distributing those [funds] otherwise. I just don't have any expertise in that area nor have I given that sufficient consideration. But you are quite correct. There is $300 million in unclaimed funds from bankruptcy cases.

Mr. MARINO. Well, in the 8 years that I have been here, I occasionally—we find unclaimed funds here and there. And I think this is one area where it would be important for us to look into to help defer these costs.

Judge Stout, there was some testimony by Attorney Rao concerning people not knowing or asking if they can waive the fee that they would have to pay to the court, or it is just not being evenly addressed across the country.

Could you clarify that a little bit if that is at case?

Judge STOUT. I cannot comment about other courts. I do know that I routinely deal with motions to waive filing fees in my court, and they are granted fairly often.

I do take an approach to it that I look beyond the poverty guidelines. I look beyond the schedule I and J of the bankruptcy petition. Schedule I is the income. But I will also look at whether or not the debtor has substantial exempt assets. Sometimes debtors file bankruptcy, and they may have substantial retirement funds that are exempt. And if a debtor has retirement funds that are exempt or substantial equity if their residence, then that is a factor I take into consideration on whether or not to grant the fee waivers as well.

Mr. MARINO. Mr. Cicilline.

Mr. CICILLINE. Thank you, Mr. Chairman.

I want to go back to this question about how the burden of additional costs should be borne. I mean, you would agree, I take it, that the primary beneficiaries of asset chapter 7 cases are the creditors, right?

Judge STOUT. Yes, creditors. And as has been alluded to, taxing authorities as well. Trustees collect a lot of money that is distributed to taxing authorities. And many times those taxes are nondischargeable, so it benefits the debtor as well.

Mr. CICILLINE. Given the fact that the creditors largely benefit from the administration of bankruptcy cases, wouldn't it be more equitable to require creditors to bear some of this increase rather than imposing the entire burden on the debtor? I mean, it just seems like kind of—I know you have expressed your support for H.R. 3553. But wouldn't a kind of shared responsibility for this increased cost make sense in light of who benefits from the administration of the bankruptcy system?

Judge STOUT. Well, I just don't know how practical that would be. Currently, creditors file claims in bankruptcy cases. And Mr. Rao alluded to assessing a fee to file a claim. Those claims that are filed sometimes, for one reason or another, they don't receive anything on that claim. Say, for instance, in a case that is designated as an asset case, the trustee collects assets, and then there are tax claims that come before the creditor claims, the unsecured creditor claims, and all the funds collected by the trustee is paid to the taxing authority. And so you have charged a creditor $5, $10 to file a proof of claim. They don't get anything back on it. And I think it would have a chilling effect on creditors even filing claims in bankruptcy cases.

There are some mechanisms where creditors do pay for their access to the system, as I alluded to earlier, motions to terminate the stay, adversary proceedings, filing fees on those. But that is the APs, adversary proceedings, are a small number.

Mr. CICILLINE. All right. Mr. Rao, you know, when you think about other places where creditors would have access to recovery, in the private market, creditors would have to pay anywhere between 33 percent and 40 percent commission. But in an asset chapter 7 case, that percentage drops to less than 10 percent. And as a result, aren't creditors vastly benefiting from this disparity, and, therefore, shouldn't creditors pay a greater commission as a result of that?

Mr. RAO. Yes, I think they do. And it is, certainly, especially the unsecured creditors, who do benefit, and when you look at some of the asset reports that Director White's office collects, you can see that they often do benefit quite considerably from the—even from small asset cases. A lot of that money does go to unsecured creditors. And I think it is a small price for them to pay for that. It is certainly a much better deal than trying to collect that debt outside of bankruptcy.

I think Judge Stout mentioned in terms of the filing fee that—I think my proposal would be that the filing fee for a proof of claim would be assessed in the chapter 7 cases, and they would only be asked—in the typical chapter 7 case, creditors are not asked to file filing fees but only until assets have been recovered. So then a notice goes out, and they can file a fee. Judge Stout is correct that

there may be some cases where, even after they go through that process, they might not get a recovery because of tax priority claims. But I think, in many of these cases, they would actually get a recovery. And, again, I am talking about a very small amount, $5.

Mr. CICILLINE. Okay. Thank you.

Mr. Chairman, I would ask unanimous consent that the very eloquent and powerful opening statement of the Ranking Member of the full Committee, Mr. Nadler, be made part of the record.

Mr. MARINO. Without objection.

Statement submitted by the Honorable Jerrold Nadler, New York, Ranking Member, Committee on the Judiciary. This material is available at the Committee or on the Committee Repository at: https://docs.house.gov/meetings/JU/JU05/20180926/108455/HHRG-115-JU05-20180926-SD002.pdf

Mr. CICILLINE. Thank you.

I yield back.

Mr. MARINO. The Chair now recognizes the Chairman of the full Judiciary Committee, Congressman Goodlatte from Virginia, for his opening statement, and if he would like to proceed, then, into questioning the panel.

Chairman GOODLATTE. Well, thank you very much, Mr. Chairman. I apologize for being late. I will just give my opening statement and reserve questions for later, if that is appropriate.

Chapter 7 trustees play an essential role in the administration of a liquidation bankruptcy. A chapter 7 trustee investigates the financial affairs of the debtor, pursues preference, and fraudulent conveyance claims on behalf of the bankruptcy estate, and determines whether creditors' proofs of claim are objectionable. Trustees also serve as administrators of debtors' plans under the Employment Retirement Income Security Act.

Notwithstanding their performance of numerous important bankruptcy duties, in most cases, chapter 7 trustees are paid only a flat fee of $60 for their services. This dollar amount was fixed by statute in the mid-1990s, was not indexed to inflation like other dollar amounts in the Code, and has not been increased in over 20 years.

In liquidation cases in which assets are distributed to creditors, a trustee earns a commission based on the value of the administered assets. That commission, however, is not typically large. In 2013, for example, the average trustee commission in an asset case was $2,468. Asset cases, moreover, are by far the minority of cases. For example, in 2010, out of 1.4 million chapter 7 cases filed, only about 60,000 were asset cases.

Given the range of important duties that chapter 7 trustees must perform, it is not hard to conclude that these trustee are undercompensated. This seems especially true in cases in which the Bankruptcy Code requires the trustee to administer and close out the debtor's 401(k) and other ERISA-qualifying benefit plans. Sometimes this process takes years, but even in those cases, the trustee typically receives only the $60 base pay amount.

Congress should consider seriously whether and how to raise chapter 7 trustee compensation. The bill we consider today would provide a raise by increasing bankruptcy filing fees. That is a rea-

sonable approach given that the current $60 level has not been adjusted for inflation since it was first set in the 1990s.

I look forward to further discussion in this hearing.

Thank you.

Mr. MARINO. I am going to enter into the record a statement from and on behalf of the American Bankers Association. I don't hear any objection, so that is so entered.

This material is available at the Committee or on the Committee Repository at: https://docs.house.gov/meetings/JU/JU05/20180926/108455/HHRG-115-JU05-20180926-SD003.pdf

Mr. MARINO. Ladies and gentlemen, I want to thank you for being here. It has been very educational. I always find that our sessions, particularly when we get a chance to have a second round and really drill down into the bedrock, and as the Director said, I think the technical changes we can take care of. And I stand by this is as a good solid piece of legislation. We are going to continue to work hard to see that this moves forward.

So this concludes today's hearing. Again, thank you for being here.

Thank you for the people in the gallery being here.

And, without objection, all members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

The hearing is adjourned.

[Whereupon, at 11:32 a.m., the Subcommittee was adjourned.]

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